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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971
No. 72-13

ANTONIO SEGURA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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POINT I

The government argues that any evidence that Edward Taillet was lying about his past drug dealings would have been collateral. The government also argues that the defense alluded to such prior dealings on summation and that the government did not contest this argument in its summation.

Taillet's past dealings in narcotics, and the fact that he concealed them at trial bear directly on his credibility as a witness. The government itself, in summation, played up Taillet's supposed naivete as the basis for his credibility. His background of narcotics dealings provide the motive to lie which the prosecution assured the jury did not exist.

Napue v. Illinois 360 U.S. 264 is

expressly contrary to the government's position. As quoted in petitioner's original papers, the court in Napue stated:

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."
>
> 360 U.S. at 269

That the concealed evidence went to Taillet's credibility does not lessen the necessity to disclose it. Credibility is the primary concern of the jury. It must determine who is to be believed. The withholding of evidence which is necessary for such

determination has been condemned by this and other courts and should not be countenanced in this case.

The government contends that the prosecutor's remarks at sentence were supported by the trial record, not inconsistent with his position at trial, and did not reflect any knowledge undisclosed at trial. The petitioner has searched the record thoroughly and has failed to uncover a single instance, outside of the argument by defense counsel, in which Taillet was correctly portrayed as having a history of narcotics transactions. On the contrary, the prosecutor went to great lengths in his summation to demonstrate Edward Taillet's naivete. The prosecutor explained to the jury that Taillet was not told the entire

plot, nor even the last names of his co-conspirators. This is hardly consistent with a representation of an experienced narcotics trafficker.

Finally the government asserts that even if it failed to present evidence of Taillet's background, the petitioner was not prejudiced since defense counsel argued such dealing to the jury. Argument is not evidence. Although the defense could well argue that Taillet was no lightweight, it was denied the evidence needed to demonstrate its claim. Certainly the opportunity to argue one's beliefs in summation is not to be equated to the possession of real evidence to be presented for the jury's consideration.

POINT II

The government insists that the petitioner and his wife freely waived their Fourth Amendment protections and consented to a search of their apartment. It claims that the petitioner was arrested, taken to the Assistant United States Attorney, advised of his rights, and asked for permission to search his apartment. The government contends that the petitioner consented to the search and then telephoned his wife who also consented.

This trite sequence of events ignores the circumstances attendant on these events which exerted considerable coercion upon the petitioner's supposed "voluntary waiver".

Importantly, the petitioner was in

the custody of federal law enforcement officials [and was not represented by counsel although he had requested an attorney]. He was held nearly two hours waiting for the Assistant United States Attorney.

Present during his interview with the AUSA were several other government officials. The petitioner was informed that federal agents were already in his apartment with his pregnant wife and elderly grandmother.

These facts indicate that the petitioner was under the complete domination of the federal officials and he knew his wife to be in essentially the same position. He was in a room with several law enforcement officers and in his apartment were at least five more officers awaiting their

orders. Such a situation can in no way be considered free of coercion.

The court must surely recognize that government officials are not universally viewed as benign figures, anxious to aid and eschewing violence. All too often in the past few years the public has had reason to doubt the self-control of some law enforcement officials. The overwhelming presence of so many officers both with the petitioner and with his pregnant wife and grandmother could easily lead even a more sophisticated person to decide that surrender was the best and safest path to follow. And so, under these coercive circumstances, the petitioner "consented" to the search of his apartment.

POINT III

The government has misconstrued the petitioner's argument concerning the introduction of evidence of his attempted escape. The petitioner contends that it was improper to admit this inflammatory and highly prejudicial evidence because it had little or no probative value on the question of guilt. Years ago this Court recognized that an innocent man may well pursue a course of conduct which a guilty man might also pursue - specifically a flight from a crime scene. Alberty v. United States 162 U.S. 499, 511. This thought has been reiterated in Wong Sun v. U.S. 371 U.S. 471.

Under the circumstances of this case there is no basis whatsoever for the

conclusion that the petitioner's attempted escape evidenced a consciousness of guilt. The petitioner was unable to satisfy the very high bail set for him. He had a family whose welfare concerned him and he faced the prospect of a long, expensive criminal trial. The petitioner had been in federal custody more than six months when he attempted to escape.

The effective denial of bail in this case negates any possible inference of guilt which might be drawn from the flight of the defendant. His continued incarceration created innumerable reasons other than guilt which might easily motivate an escape. Therefore to avoid the inherent prejudice created by the introduction of evidence with no true probative value on the issue of guilt,

the court should have excluded the evidence.

POINT IV

The government contends that the effect of the judge's inflammatory rhetoric on the subject of drugs was cured by later statements made by the court. Specifically, the government contends that any effect was neutralized by the judge's later statement that nothing he said was evidence and that he had "no opinion" concerning the case.

The proper course for the court would have been to avoid such rhetoric in the first instance. It was highly improper for the court to raise images of the horrible effects of narcotics and the communal fight against them and then, somewhat later, to tell the jury to disregard the court's

the court should have excluded the evidence.

POINT IV

The government contends that the effect of the judge's inflammatory rhetoric on the subject of drugs was cured by later statements made by the court. Specifically, the government contends that any effect was neutralized by the judge's later statement that nothing he said was evidence and that he had "no opinion" concerning the case.

The proper course for the court would have been to avoid such rhetoric in the first instance. It was highly improper for the court to raise images of the horrible effects of narcotics and the consequent fight against them and then narrowly caution to tell the jury to disregard the courts

statements in coming to a decision. The jury can well believe that the judge would do nothing improper and, therefore, if the judge said something, he meant to say it and they were meant to hear it.

The prejudice of inflammatory judicial remarks was not cured by a simple, general disclaimer uttered hours later.

POINT V

The government never connected the use of the name Wilfredo Valentin to the commission of the offense charged. The government claims the petitioner's use of an alias is evidence of consciousness of guilt. Even were that so, there was no evidence presented which connected this consciousness of guilt to the crime charged.

The use of the alias in the trial was a blatant attack on the character of the defendant and as such was improperly made an element of the case. It was obviously the intention of the government to portray the petitioner as an evil man merely because he allegedly used an alias. There being no nexus between the use of the alias and the crime charged, the evidence should have been excluded because of its highly prejudicial nature.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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